IN THE CORPORATION COURT OF THE CITY OF ROANOKE, VIRGINIA.

THOMPSON *v.* N. & W. RY. CO.

1. **Master and Servant—Negligence of Fellow Servant.**—Section 1294 k, Code 1904, held to include a helper in the machine shops of a railroad company injured through the negligence of his immediate superior.

2. **Constitutional Law—Class Legislation.**—Section 1294 k, Code 1904, construed to include a helper in the machine shops of a railroad company injured through the negligence of his immediate superior, is not unconstitutional as class legislation.

Upon the defendant's demurrer to plaintiff's declaration.

Opinion.

WALLER R., STAPLES, J.: The demurrer raises directly the question, is a railroad company liable to an employee, engaged in its machine shops, for the negligence of his immediate superior?

Our Constitution (§ 162) provides that certain enumerated classes of railway employees shall not be held to assume the risk of negligence of certain enumerated classes of fellow servants. By both express provision and necessary implication the legislature is left with full power over this field of legislation except it may not abridge the immunity created by § 162 nor violate the Federal Constitution. In the exercise of this power the legislature has, by § 1294 k, Code 1904, extended this immunity to "any employee" of "every corporation operating a railroad in this state provided the servant, whose negligence caused the injury comes within the classes therein designated."

Two questions are thus presented.

1st. Do the words "any employee" include servants engaged, as was the plaintiff, at work in defendant's machine shops?

2nd. So construed, is the Act void as class legislation?

The first question we may pass for the present as involved in the second since the language of the statute "any employee" is broad enough to include the plaintiff and his exclusion is contended for only on the ground that such exclusion is necessary to give validity to the Act.

In reference to the second question it is contended that such a construction of the statute gives to it the effect of "class legislation" and brings it within the condemnation of the Fourteenth Amendment for as much as it denies to such companies the same protection granted other employers. Specifically it is contended that the constitutional provision (§ 162) escapes this condemnation only because it limits this immunity to a dis-

tinct class of servants whose duty and occupation impose upon them hazards peculiar to railroad construction, maintenance and operation and that to enlarge the class of such preferred servants beyond the scope of such peculiar hazards is not such a classification as is permissible in legislation of this character. And that in as much as there are large numbers of individuals and private corporations engaged in certain occupation (such as the building and repairing, of machinery, locomotives and cars) similar to those in which railroad companies are engaged, it is class legislation to impose upon the railroad companies, in respect to such occupation, a liability not imposed upon others similarly engaged.

We must then inquire what is the limitation upon legislative classification? It is held that such statutes must operate alike upon all persons (including, of course, corporations) similarly situated; but must this similarity have reference to the relation which the class of persons affected thereby, as an entire class, bears to the requirements of such a statute; or must this similarity have reference to the relation which the particular act or conduct of such person, controlled or affected by the statute, bears to its requirements or provisions, and must this similarity relate to every particular act or phase of conduct affected or regulated; or is it sufficient if it relates to a class of acts or scope of conduct which, as an entirety, has sufficient characteristics to admit of inclusion in a general class?

Upon this point the Supreme Court says (Haller *v.* Nebraska, 205 U. S. 44) that such classification must be upon some reasonable ground—"some difference which bears a just and proper relation to an attempted classification and is not a mere arbitrary selection." Yet it is not sufficient that such classification "may possibly be arbitrary and unreasonable. It must be clearly and actually so." Bachelor *v.* Wilson, 204 U. S. 41.

In M. P. Ry. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, the Supreme Court had under consideration the validity of a Kansas statute which imposed upon "every railroad company" liability "for all damages done to any employee of such company in consequence of any negligence of its agents," etc. The statute was held to be valid. It is true that case involved injury to a fireman and it might be said only determined the validity of the statute so construed as to cover that case; but it will be noted that Judge Dillon, for the plaintiff in error, contended that the statute was to be tested by what might be done, not what was sought to be done, under its provisions and apparently in answer to that contention Mr. Justice Field said:

"It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage

coaches and to persons and corporations using steam in manufacturies."

Nevertheless the opinion is not conclusive of the question here presented, which is of sufficient importance to require its examination upon reason and principle since it is not settled by controlling authority.

Thus approaching it we find the persuasive authorities wholly at variance and we find moreover that the courts have wisely refrained from any attempt at exact definition of such legislative powers, but have been satisfied to pass upon each statute as presented and to apply to each a rule of reasonableness; still more wisely declining unto themselves the duty or power of substituting judicial for legislative discretion.

PRESUMPTION.

"When a state legislature has declared in its opinion policy requires a certain measure its action should not be disturbed by the Court unless they can see clearly that there is no reason for the law that would not require with equal force its extension to others whom it leaves untouched." M. K. & T. v. May, 194 U. S. 265, 48 L. Ed. 972.

"It is only a palpable abuse of the power which can be judicially reviewed and the right of review is so delicate that even in its best exercise it may lead to challenge." Conolly v. U. S., 184 U. S. 570, 46 L. Ed. 694.

If we admit the propriety of "classification" we cannot escape the necessary consequence of some measure of discrimination. To gather within the boundaries of immunity or liability a class of persons by such definition as to make certain such boundaries is to admit the impossibility or impracticability of classifying the act or conduct (which furnished the basis of classification) instead of the business or occupation. If a statute imposes liability or grants immunity only in respect to the act or conduct (furnishing such basis of classification) and not upon and to a specified class, then such statute would have all the characteristics of general law and would not even be an attempt at reasonable classification.

A statute fixing conclusive legal capacity at a definite age classifies upon the basis of mental competency but the boundary line is arbitrary. Such statutes might make the fact of mental competency the test in each case but this would be to avoid classification at the sacrifice of certainty or practicability. So, to fix immunity by measure of hazard would be ideal in its expression but hopeless in its application—the hazard being incapable of practical legal definition must necessarily be classified and if the classification must be free from inequality it must

go back to the refinements of the different degrees of hazard and cease to be classification.

CLASSIFICATION.

"Classification," says Mr. Justice McKenna in Billings *v.* Ill., 185 U. S. 102, 47 L. Ed. 403, "is the grouping of things in speculation or practice * * * crossing the line of classes, created by statute, discriminations may be exhibited, but within the classes there is equality."

"It necessarily implies discrimination between persons composing the class and other persons." McKenna, J., in Connolly *v.* U. P. Co., 184 U. S. 570, 46 L. Ed. 694.

Mr. Justice Brewer recognizes "to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all" and recognizes "the right of classification of industries and occupations." Cutting *v.* Garard, 183 U. S. 112, 46 L. Ed. 109, recognizing as valid "legislation which in its indirect results affect different individuals or corporations differently in which classification is based upon inherent differences in the character of business."

Harlan, J. says of classification that it "Must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." Connolly *v.* Union S. P., 184 U. S. 560, 46 L. Ed. 690. "The act does discriminate in favor of a certain class of refiners but this discrimination if founded upon a reasonable distinction in principle is valid." Brown J., in American Sugar Co. *v.* Louisiana, 179 U. S. 89, 45 L. Ed. 102.

"Legislation may distinguish, select and classify objects of legislation and necessarily the power must have a wide range of discretion." McKenna, J., in Magoun *v.* Ill. T. & S., 170 U. S. 294, 42 L. Ed. 1043. "There is therefore no precise application of the rule of reasonableness of classification and the rule of equality permits many practical inequalities" (p. 276). Justice Brewer dissenting, same case, "of course absolute equality is not attainable and the fact that a law works unequally in its actual operation does not prove its unconstitutionality."

A case almost identical in this respect was before the Supreme Court of the United States in Erb *v.* Morasch, 177 U. S. 584, 44 L. Ed. 897. An ordinance fixing the speed of trains and cars within the corporate limits but excepting street cars ("dummy drawn cars") was held valid and the classification reasonable inasmuch as different streets supplied different traffic and the classification by character of vehicles instead of by a measure of street traffic was reasonable. Can it be supposed that a different conslusion would have been reached because the included and excluded vehicles happen to traverse for a square the same street?

Is every classification unreasonable because the included and excluded classes have a point or line of common contact? The terms "similarly situated" of itself excludes the idea of exact co-ordination.

Other cases decided by the Supreme Court of the United States hold that (M. K. & T. *v.* May, 194 U. S. 265, 48 L. Ed. 972) a statute making railway companies alone punishable for permitting Johnson grass to grow upon its property held valid. Mr. J. Holmes says: "The question is, whether the case lies on one side or the other of a line which has to be worked out between cases differing *only in degree.*"

Hing *v.* Crowly, 113 U. S. 703, 28 L. Ed. 1145, an ordinance fixing hours for work in certain sections of San Francisco was held not to discriminate either against other trades or excluded laundries.

Applying these principles to the case at bar we may for convenience consider all employees of railway companies as divided into two classes: first, those whose hazard is peculiar to railway construction, maintenance and operation (such as are protected by our constitution, § 162); and second, those whose hazard is less than these. Hundreds of persons and corporations employ servants whose hazard are equally as great as those in class one and thousands of persons and corporations employ servants of the second class. The constitution discriminates as to class one between those employed by railroad corporations and those not so employed; yet its validity is not contested. The Legislature discriminates as to class two between those employed by railroad companies and those not employed—why by the same test should it not be held valid? The contention is that the classification by the constitution is reasonable and proper in that it has selected the peculiar hazards of railway construction, maintenance and operation as the basis for classification and that such selection is within legislative discretion but that the Legislature has selected no basis for classification save and except the arbitrary basis of the occupation of the employer. The defect in this contention is that it overlooks the salient fact that the Legislature has selected as a basis not merely the occupation of the employer but the occupation, duty and character of employment of the felow servant for whose negligence the employer shall be held liable.

If the statute provided that every employee of such companies should be allowed recovery for the negligence of every fellow servant the argument might have more force; but the liability of such companies is enlarged only when the negligent servant is (1) superior of the injured servant, (2) a co-employee engaged in another department of labor or (3) is engaged on

train of cars different from that on which the injured servant may be, or (4) is in charge of a switch, locomotive, or (5) a transmitter of telegraphic or telephone orders. If only the negligent servant designated (3), (4), and (5) were mentioned in the statute, its validity would not and could not be questioned—yet even so written it would exclude and discriminate against thousands of employees of industrial corporations, other than railroads, injured through the negligence of fellow servants engaged on locomotives, at switches, or transmitting orders; and so written in the statute would be upheld because the Legislature might reasonably have based its classification, not upon the probability of injury or degree of hazard, but upon the peculiar and specific kind of hazard especially characteristic of railway occupations.

As it is written, including (1) and (2), that is superior servants and servants separated by departmental divisions, the statute in a degree discriminates against thousands of employees engaged in other industrial occupations but are not the relation of superior and inferior railway servants, and the division of such servants into departments of labor, possessed of characteristics as peculiar as the mere degree of railway hazard, and do not these relations differ from like relation and division in other industrial occupations to as great an extent as the railway hazard differs from the hazard of bridge builders, workers upon highly charged electric wires, mine workers and the countless dangerous occupations incident to an age of unprecedented industrial activity?

Suppose a railway company is opening the north end of a cut by force account, and the south end by contract; a laborer employed by the railroad company in the north end may recover from his employer for his foreman's negligence, but the one employed by the contractor in the south end may not recover from his employer for the negligence of his foreman.

Is the difference between the hazard of these two men greater than that between that of an engine builder or helper in the company's shops and of an engine builder or helper in the shops of a private individual?

The first distinction is made by our constitution, the last by our statute; the one is admittedly valid, the last is questioned but with what force of reason? But suppose these differing characterics are not as peculiar in the first two classes as in the last three; yet it is for the courts to say that the one should have appealed to the legislative discretion and the other should not; that the one is reasonable and the other arbitrary—clearly and unmistakeble arbitrary.

The courts are growing more and more reluctant to subject

legislative discretion to judicial review under the claim of constitutional tests. Legislatures in making laws are possessed of all state sovereignty and express the political will of the people, they are in touch with popular need and responsive to popular demands and these two are the impelling motives and controlling influences of all governmental action. While the limitations imposed by state and federal constitutions must always control, yet these are self-imposed limitations upon sovereign and otherwise unlimited powers and where the question of legislative infraction includes a question of public need, it is never for the courts to undertake to measure the scope or extent of that need. When the question involved is one for the legislatures to decide that decision must be clearly, plainly and unmistakably wrong before it can be subject to judicial correction.

What are the classes of employees, both as to their employment and their employers, who need protection under such a law as this, is essentially a question of police policy; and a legislative classification based upon a distinct and well distinguished class of employers and employees whose occupation, if not in all its elements distinctively peculiar, is at least so in its principal element, with its secondary elements, directly incident and contributory thereto, and which as a whole bears a distinctively peculiar relation to the public interests and public activity, is not to be declared plainly arbitrary because other occupations or employers might, by the test judicial opinion, be more wisely included. The courts cannot say that the public has not an interest in the welfare and safety of servants of certain common carriers, as an entire class sufficiently direct and important to justify legislative recognition.

I am not unmindful that there are numerous cases from courts of high persuasive authority, holding that such statutes must, to be held valid, be so construed as to limit their application to servants injured in occupations relating to railroad operation; but upon reason these cases do not satisfy me nor upon authority are they binding or exactly in point. These cases are collected in case notes in 12 L. R. A. (N. S.) 1040, 18 L. R. A. (N. S.) 478 and 22 L. R. A. (N. S.) 969.

Upon reason they do not appeal to me for they give to the statute an uncertainty which is not desirable from the point of view of public interest. Such a construction gives too broad a twilight-zone between occupations clearly incident to railway operation and those clearly not so, within which broad area the application of the statute must be left to judicial construction, to an extent to amount to judicial legislation. Courts cannot be charged with judicial knowledge so extensive, so tech-

nical and of such minute exactness as to permit them to say what is and what is not a railway occupation or hazard. They can not classify these upon the evidence in each case because, there being no legal definition of railway hazard, there can be no standard by which the evidence is to be measured; they cannot hear the evidence of "experts" on such points because this would be not only assumption by the courts of a delegated power, to fix a legal obligation by judicial interpretation of related facts and public needs; but would be a redelegation of that power to partisan experts; nor can the question be left to juries for like reason. This view is sustained in Ballard *v.* Miss. Cotton Mills (Miss.), 62 L. R. A. 407, in an opinion able, exhaustive and upon this point clearly convincing. Chitfield, C. J., says:

"Limitation by judicial construction is not severance of a statute * * * where there are just two words 'any employee.' What the court does is simply to look to the evidence in each case and from that evidence determine, not from the provisions on the face of the statute, whether the particular employee is or is not the kind falling within the supposed, not declared, intent of the act. * * * We think this is judicial legislation (p. 417). * * * It is perfectly obvious to our minds (citing Keokuck *v.* Keokuck, 85 I. S. 80, — L. Ed. 377, and Rose's Notes) that the Supreme Court of the United States distinctly holds as its own view, that this sort of severance or so called limitation by judicial construction, where the court determines by the evidence in each case, is not allowed (p. 419)."

The authorities above referred to for this limited interpretation of the statute are not in point for two reasons:

First, our constitution goes further than is called for or is permitted by the test of experience as to what constitutes the peculiar hazards of railway operation since § 162 extends this immunity to servants engaged in the construction and maintenance as well as the operation of railroads and has been held valid by our court of appeals in C. & O. Ry. Co. *v.* Hoffman, 109 Va. 44, and,

Second, because this section of the Constitution extended this immunity only to servants engaged in such construction, maintenance and operation and the only change made by the Legislature is in extending it to others than these.

The classes of servants for whose negligence an employee may recover under the statute are the same as those specified in the constitution and are specified in practically the same language. The Legislature, under the express authority given by the constitution, extended this immunity to a large class of injured servants and in so doing intended to make some change; to enlarge the class to some extent—yet to give the statute the

construction asked for by the demurrant would be to nullify the only change made in antecedent law and in effect declare the statute invalid.

The whole doctrine of which Judge Brannon terms "fellow servantry" is predicated upon an implied contract for the assumption of risk. Every employer and every employee should know with a reasonably certainty the obligations which the law implies from the fact of employment. This can never be if the railway servant contract with the company varies according to the hazard of each different task, to which he is assigned or if that contract has one legal effect when the hazard is a "railway hazard" and a different legal effect when it is not a railway hazard; since in order for the courts to determine the nature of the contract the measure of hazard must be of clear, legal definition. Reading the statute as it is written the difficulty disappears. Surely the court will not read into so plain a statute an ambiguity and uncertainty which must test every judicial recourse for its intelligent application.

I cannot avoid the conclusion that to construe the statute so as to exclude the plaintiff from its protection is literally to wipe it out and leave the law where the constitution places it. I must construe it to include the plaintiff but I can not for that reason declare it invalid.

Although the Supreme Court in Tullis *v.* Lake Erie, 175 U. S. 348, 44 L. Ed. 192, held that the Indiana statute, as construed to include only hazardous employments, was valid, yet in L. & N. *v.* Melton, 218 U. S. 36, Justice White said, "It was not intended to intimate that such construction was necessary to save the statute from condemnation," and the language and reasoning and the precise question involved in the last-named case strongly if not directly supports the conclusion here reached that the demurrer in this regard should be overruled. Other objections to the declaration are mentioned in the demurrer but were not argued or submitted.

Note.

The point dealt with in the principal case as to the constitutionality of § 1294k of the Virginia Code has never before been urged, though this section, as might readily be expected, has been attacked as unconstitutional on other grounds. While Mr. Justice White, in the Standard Oil Case, recently decided by the United States supreme court, said that the debates of the Assembly could not be looked to in interpreting a statute, he nevertheless qualified this by saying that they might be resorted to in order to determine the history of the times leading up to such legislation. The attack made on the constitutionality of this section proceeded on a false theory and did not take into consideration the fact that some employments are more hazardous than others, so much so, in fact, that a statute dealing with this employment to the exclusion of other employments, doing the same class of work, may be constitutional and still not in-

clude the less hazardous occupation, because, in the language of the Federal Supreme Court, this discrimination is founded upon a reasonable distinction and bears a just relation to the act in respect to which the classification is proposed.

The real test to be applied in all these cases is whether the classification is reasonable or a mere arbitrary selection. Wisconsin, etc., R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194.

Applying these tests, there can be no doubt of the correctness of the court's decision in the principal case. The agitation which led up to the enactment of this statute was due to the vast number of accidents occurring in this particular occupation, namely, the moving and handling of railroad cars, and it is a matter of common knowledge of which the court will take judicial notice that such employment is more hazardous than others in which construction and repair work on locomotives and cars is performed. Hence it cannot be said that the difference made by the statute is an arbitrary or capricious one. It is obvious, and our Supreme Court has so decided, that this section only applies to railroad companies operated by the dangerous instrumentality of steam, and does not apply to street railroad companies, and by parity of reasoning the enactment would also exclude other public service companies.

In State *v.* Hoskins, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, the Supreme Court of Minnesota held that a statute of that state, requiring street car companies to protect their motormen from exposure to the weather, by enclosing the front end of the cars, is not void as class legislation, though it applies only to electric, cable and steam cars. The court justifies this decision on the ground that the care and control of the cars by the employees, allowing protection from the weather, is different with cars propelled by motors, as distinguished from those drawn by horses. The court justly said that the evil sought to be remedied does not exist in the case of slowly-going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric or steam cars and that the difference in this respect between cars included in this act and those not included, is such as to justify a difference in legislating. In other words, where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied while in the latter it cannot be.

It has also been held in State *v.* Nelson, 52 O. St. 88, 39 N. E. 22, 26 L. R. A. 317, that a law entitled, "An act requiring street car companies to provide for the well-being of employees," but which requires electric street car companies only to provide a screen on the front end of their cars, during the winter months, for the protection of motormen, is not unconstitutional, as being class legislation.

In conclusion, it may be stated that this section of the Virginia Code is in operation in every part of the state and operates uniformly upon the classes of persons therein designated in the remotest confines of the jurisdiction. The act is clearly authorized as a police regulation to protect the safety and promote the comfort of those engaged in handling the rolling stock of a railroad company. If there are other persons requiring protection, such protection should be sought through the general assembly by increasing the protected class, rather than by removing all protection by the action of the courts.